1 RISE (MALAYSIA) SDN BHD v. INSPEKTOR, KEMENTERIAN KESIHATAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[ORIGINATING SUMMONS NO: 24NCVC-904-06-2014]
20 OCTOBER 2014

TORT: *Trespass to land – Wrongful entry and search – Entry, search and sealing of premises without warrant – Whether complied with s. 90 of Private Healthcare Facilities and Services Act 1998 – Whether there was "reasonable cause to believe" delay in obtaining warrant will cause evidence to be destroyed or tampered with*

The plaintiff was the tenant of two adjoining lots at Lot 10-1 and Lot 12-1, Block B, Seri Desa Entrepreneur's Park. The plaintiff agreed to sublet the said premises to one Dr Kok to operate a medical clinic without any payment of rental until he obtained the necessary licence from the Ministry of Health ('the Ministry'). Dr Kok had duly applied for the said licence and the Ministry's officers had made periodic visits to the premises to ensure that the clinic fulfilled the requirements set by the Ministry. By a letter dated 29 November 2013, the Ministry gave Dr Kok four weeks to furnish them with additional information and supporting documents, failure of which would nullify Dr Kok's application and the premises would be deemed to be unregistered. Subsequently, 17 days prior to the deadline stated in the letter, officers from the Ministry entered and searched the plaintiff's premises without a search warrant and without consent. The officers prepared a search list on the items found at the premises and some of the items listed were removed from the premises. The defendants, as representatives of the Ministry, then proceeded to seal the premises on the ground that there was reasonable cause to believe that it was being used as a private healthcare facility without a licence. The defendants thereafter rejected Dr Kok's application to have the seal removed from the premises and instructed him to apply to the court for the removal of the seal under s. 91(3) of the Private Healthcare Facilities and Services Act 1998 ('the Act'). On 4 August 2014, the defendants broke the seal and entered the premises again, without informing the plaintiff. The defendants re-entered the premises the next day, this time with a representative from the plaintiff present, who objected to the re-entry but was told that the defendants had obtained a court order to do so. However, no copy of the order was produced before the plaintiff's representative despite his request for the same. On 19 June 2014, the plaintiff filed his application by originating summons to declare, *inter alia*, that the entry, search and the sealing of the premises was unlawful. Some of the issues raised were (i) whether the entry and search into the premises was lawful; (ii) whether the defendants had the power to seal the movable properties in the premises; and (iii) whether the sealing of the premises was valid.

Held (allowing application):

(1) Every unathorised entry upon private property is a trespass. An enforcement officer who entered a private property without the leave or licence of the owner had committed trespass unless the entry was authorised or excused by law. Investigators have the intrusive statutory power to enter, search and seize, which infringes fundamental rights of an individual from having his property and privacy interfered by the state. Therefore, it is essential that it is done in accordance with law. (para 14)

(2) Section 89 is different from s. 90. The former relates to entry and search with a search warrant, while the latter relates to entry and search without a search warrant. Under s. 89, an officer has an obligation to obtain judicial authorisation by obtaining a warrant before entry and search of premises. An officer also has the power to enter and search premises without a search warrant but only if he fulfils the condition under s. 90, ie that he has reasonable cause to believe that delay in obtaining a search warrant under s. 89 would lead to the destruction or tampering of evidence. The phrase "reasonable cause to believe" must be read to mean that when the officer made the decision to enter and search premises under s. 90, he had reasonable cause to believe, prior or at the time of entry, that if the search was delayed, evidence would be destroyed or tampered with. (paras 16-17 & 20)

(3) There were no other particulars averred to explain the defendant's belief or reasonable grounds for relying on s. 90 apart from the mention that the entry and search of the plaintiff's premises were based on information received. The defendant had failed to show compliance with the section, rendering the entry and search unlawful in its entirety from the outset and all subsequent actions that follow was equally unlawful. (paras 22 & 24)

Case(s) referred to:

Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors [2009] 2 CLJ 286 HC ***(refd)***

Loh Kam Hon v. Ketua Pengarah Kastam Diraja Malaysia [2012] 2 MLJ 682 ***(refd)***

Legislation referred to:

Private Healthcare Facilities And Services Act 1998, ss. 89, 90(b), 91(3)

For the plaintiff - Abdul Malik Abdul Hakim (Augustine Anthony with him); M/s Abdul Malik Hakim

For the defendants - Natra Idris; SFC

Reported by Lyana Shohaimay

JUDGMENT

SM Komathy Suppiah JC:

[1] On 12 December 2013, officers from the Ministry of Health entered and searched the plaintiff's premises without a search warrant and without its consent. Thereafter, the premises was sealed on the ground there was reasonable cause to believe that it was used as a private healthcare facility without a licence. On 19 June 2014, the plaintiff filed this application by originating summons to declare, *inter alia*, the entry, search and the sealing of its premises unlawful.

Background

[2] Before turning to consider the issues raised in this application, it is appropriate first to briefly outline the circumstances which have prompted the present proceedings. The plaintiff was and is the tenant of two adjoining lots at Lot 10-1, and Lot 12-1, Block B, in Sri Desa Entrepreneur's Park, Jalan 1/116B, off Jalan Kuchai Lama, 58200 Kuala Lumpur. Sometime in June 2013, one Dr Kok Kah Ping ("Dr Kok") expressed his interest to the plaintiff to operate a medical clinic at Lot 10-1 under the name of HWC Healthcare Clinic. The plaintiff agreed to sublet the premises to Dr Kok without any payment of any rental until he obtained the necessary licence from the Ministry of Health.

[3] Whereupon, Dr Kok applied to the second defendant, the Ministry of Health, for a licence to operate a clinic at Lot 10-1. Pending the approval of his application, officers from the Ministry of Health made periodic visits to the plaintiff's premises to ensure that the clinic fulfilled the requirements of the ministry.

[4] By letter dated 29 November 2013, the Ministry of Health gave Dr Kok four weeks to furnish them with additional information and supporting documents. The letter cautioned that a failure to furnish these documents would:

> Sekiranya tiada maklum balas dalam tempoh tersebut permohonan Tuan boleh dianggap telah ditarik balik dan klinik tuan adalah disifatkan tidak berdaftar.

[5] However, on 12 December 2013, seventeen (17) days prior to the expiry of the deadline stipulated in the above letter, the defendants entered the plaintiff's premises without a search warrant. The officers prepared a search list ("senarai bongkar") of the items found at Lot 10-1 and Lot 12-1. Some of the items mentioned in the search list were then removed from the premises. The defendants then sealed Lot 10-1.

[6] On 25 March 2014, the defendants rejected an application by Dr Koh to remove the seal on its premises and instructed him to apply to court from an order for the removal of the seal under s. 91(3) of the Private Healthcare Facilities And Services Act 1998 ("the Act").

[7] However, on 4 August 2014, the defendants broke the seal and entered the premises without informing the plaintiff. It is not clear what items were removed.

[8] The next day, on 5 August 2014, the defendants re-entered the premises, but this time the plaintiff's representative was present. He objected to the defendants entering the sealed premises without a court order, but was notified that an order had been obtained. The plaintiff's representative requested that a copy of the court order be shown but none was produced.

[9] Some six months later, the plaintiff filed the present application to declare the entry, search and the sealing of its premises unlawful. The plaintiff claimed the following relief:

1. Satu Perintah bahawa lak keatas Premis 10-1B, Blok B, Sri Desa Entrepreneur's Park Jalan 1/116B, Off Jalan Kuchai Lama 58200 Kuala Lumpur yang dikuatkuasa menerusi Notis Mengelak Premis bertarikh 12.12.2013 dibuka selaras dengan Seksyen 91(3) Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998 dengan serta merta.
2. Satu Perintah bahawa Plaintif Plaintif dibenarkan untuk mengguna pakai Premis 10-1B dan 12 – 1B, Blok B Sri Desa Entrepreneur's Park Jalan 1/116B, Off Jalan Kuchai Lama 58200 Kuala Lumpur dan mengeluarkan peralatan yang di lak oleh Inspektor Kementerian Kesihatan Malaysia pada 12.12.2013 dengan serta merta.
3. Satu Perintah bahawa Notis Mengelak Premis yang dikeluarkan oleh Inspektor Kementerian Kesihatan Malaysia bertarikh 12.12.2013 dibawah Sub Seksyen 91(1) Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998 terhadap HWC Healthcare Clinic di alamat 10-1 B Blok B Sri Desa Entrepreneurs Park Jalan 1/116B off Jalan Kuchai Lama 58200 Kuala Lumpur adalah tidak sah (invalid) dan menyalahi undang-undang (illegal).
4. Gantirugi sebanyak RM46 200 dibayar oleh Defendan Defendan bagi jumlah sewa yang ditanggung oleh Plaintiff dari tarikh 12.12.2013 sehingga tarikh perintah diberikan oleh Mahkamah Yang Mulia ini.
5. Kos.
6. Lain-lain perintah yang dianggap sebagai sesuai dan adil untuk diberikan oleh Mahkamah yang mulia ini.

The Issues

[10] The parties raised the following issues for the court's consideration:

i. Whether the entry and search of the plaintiff's premises was unlawful?

ii. Whether the defendants have the power to seal the movable properties in the premises?

iii. Whether the sealing of the plaintiff's premises was valid?

Issue 1: Whether Entry And Search Lawful?

[11] The plaintiff contended that the entry and search conducted by the defendants at its premises was done without a search warrant in breach of s. 89 of the Act. This rendered the entry and search unlawful.

[12] In response, the defendants argued that the plaintiff's submission was misconceived as the entry and search was not conducted under s. 89 but pursuant to the powers conferred under s. 90. In urgent cases, s. 90 of the Act empowered a health officer to enter and search a person's premises without a search warrant. It was said that the defendants had relied on limb (b) to s. 90 to make the decision to search the premises without a warrant. The circumstances that existed required the defendants to move fast to secure the evidence to ensure that the object of the entry was not frustrated.

[13] The plaintiff challenged the defendants' entitlement to rely on s. 90(b). It was strongly argued that the affidavit filed by the defendants did not disclose the nature of the urgency that prompted them to invoke the power under s. 90. There was no mention of the urgent circumstances which led the defendants to make the decision that immediate action was required to preserve evidence.

[14] Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental right. In accordance with that principle, an enforcement officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law. Powers of entry, search and seizure are among the most intrusive that investigators can exercise. As search and seizure under statutory powers constitute fundamental infringements of an individual's immunity from interference by the state with his property and privacy, it is essential that it is done in accordance with the law.

[15] The powers of search and seizure under the Act are set out in ss. 89 and 90. In enacting ss. 89 and 90, the legislature has given primacy to the public interest in the effective administration of criminal justice over the private right of the individual to enjoy his privacy and property. It will be helpful to quote in full these provisions:

Section 89

(1) If it appears to a Magistrate upon written information on oath and after such enquiry as he considers necessary that there is reasonable cause to believe that:

(a) any private healthcare facility or premises has been used or is about to be used for; or

(b) there is in any private healthcare facility or premises evidence necessary to establish, the commission of an offence under this Act, the Magistrate may issue a search warrant in respect of such facility or premises to an Inspector.

(2) An Inspector to whom a search warrant has been issued under subsection (1) may, at any time by day or by night and with or without assistance:

(a) enter the private healthcare facility or premises, if need be by force; and

(b) search the private healthcare facility or premises for and seize, and remove from the facility or premises, any book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or any other thing:

(i) in respect of which an offence has been committed;

(ii) in respect of which an offence is suspected to have been committed; or

(iii) that is reasonably believed to furnish evidence of the commission of the offence.

(3) An Inspector may:

(a) break open any outer or inner door of any healthcare facility or premises, or any fence, enclosure, gate or other obstruction to the healthcare facility or premises, in order to effect entry thereinto;

(b) remove by force any obstruction to entry, search, seizure or removal as he is empowered to effect under subsection (2);

(c) detain every person found in the healthcare facility or premises until the facility or premises have been searched;

(d) in the case of a mobile healthcare facility or premises, seize such healthcare facility or premises;

(e) place any book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing, in a container;

(f) where any book, record, document, apparatus, equipment, instrument, material, article, sample, blood or blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing referred to in paragraph (e) has been seized on any private healthcare facility or premises entered into in accordance with section 88 or 89, place the book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood

product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing in a room, compartment or cabinet located on that private healthcare facility or premises;

(g) mark, fasten and seal the container referred to in paragraph (e) or, as the case may be, the door or opening providing access to the room, compartment or cabinet referred to in paragraph (f).

Section 90

If an Inspector has reasonable cause to believe that by reason of delay in obtaining a search warrant under section 89:

(a) the investigation would be adversely affected;

(b) the object of the entry is likely to be frustrated;

(c) the book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing sought may be removed or interfered with; or

(d) the evidence sought may be tampered with or destroyed, he may exercise in, and in respect of, the private healthcare facility or premises all the powers referred to in section 89 in as full and ample a manner as if he were authorized to do so by warrant issued under that section.

[16] Section 89 is quite different from s. 90. The former relates to entry and search with a search warrant. It imposes an obligation on the health officer to obtain judicial authorisation for the search by obtaining a warrant to enter the private property for the purpose of search. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. The enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed demonstrates the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

[17] The latter relates to entry and search without a search warrant. It confers a statutory power on the health officer to enter and search without judicial authorization and a warrant under certain conditions. The conditions show that exigent circumstances do permit entry to premises without a search warrant to secure and protect evidence of a crime under the Act. In exercising this power, the health officer must thus have regard to those conditions which he is statutorily bound to consider. A health officer can exercise this power only if he has:

a) Reasonable cause to believe that delay in obtaining a search warrant under s. 89 would lead to destruction or tampering of evidence.

[18] It would be useful to refer to two cases where the meaning of the phrase "reasonable cause to suspect" was considered. In *Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 2 CLJ 286; [2009] 7 MLJ 609, Zamani A Rahim JC (as he then was) declared the seizure of a motorcar under the Customs Act 1967 invalid on the ground that the customs officers had no reasonable cause to suspect at the time of the seizure, that the plaintiff's motorcar came within the definition of "uncustomed goods" as provided in the Act. In his judgment, he said:

> [10] In this case, it has not been shown the relevant circumstances where reasonable grounds of suspicion had arisen to suspect that the repaired Honda/plaintiff's motorcar was uncustomed goods. In his affidavit in reply, one Md Naeyem bin Abdul Mutalib, Penguasa Kastam, Jabatan Kastam Diraja Malaysia, Bahagian Pencegahan, Sungai Petani affirmed on 21 August 2006 at para 6 states, *inter alia*:
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> ...
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> [12] It was unclear whether Md Naeyem bin Abdul Mutalib was the custom officer who possessed reasonable grounds that the repaired Honda/plaintiff's motorcar was uncustomed goods and seized it. Nowhere in his affidavit evidence and the exhibits annexed thereto to show circumstances to trigger reasonable cause or reason to suspect that the repaired Honda/plaintiff's motorcar was uncustomed goods, an offence committed under the Customs Act or any regulation made thereunder. The reasonable cause of suspicion must exist before or at the time seizure is effected. In the absence of such reasonable cause, the seizure and detention of the repaired Honda/plaintiff's motorcar is therefore unlawful, contrary to art 13(1) of the Federal Constitution which provides as follows:
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> No person shall be deprived of property save in accordance with law.

[19] The same view was echoed by Harminder Singh JC (as he then was) in *Loh Kam Hon v. Ketua Pengarah Kastam Diraja Malaysia* [2012] 2 MLJ 682. He observed:

> It is trite law that the 'reasonable cause to suspect' provided under s. 114(1) of the Act must exist before or at the time of seizure of the said vehicle and not anytime after the seizure (see also *Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 7 MLJ 609; [2009] 6 AMR 149). It would also follow that in the absence of that reasonable cause prior to or at the time of detention and seizure, that seizure would become unlawful, null and void. It would be a violation of art. 13(1) of the Federal Constitution which states 'No person shall be deprived of property save in accordance with the law.'

[20] In my view, the phrase "reasonable cause to believe" in s. 90 of the Act must be given a similar construction. This means that a health officer who makes a decision to enter and search a private property under s. 90, must have reasonable cause to believe, prior or at the time of entry, that if the search was delayed, material evidence would be destroyed or tampered with.

[21] With this principles in mind, I now turn to the defendants' affidavit. It is necessary to ascertain the reasons why no search warrant was applied for under s. 89 in the present instance. The officer who authorised the search at the plaintiff's premises was one Mimi Zalwani binti Zakaria ("Mimi"). In her affidavit in reply affirmed on 6 August 2014 she deposed:

> 1. Saya ialah Ketua Penolong Pengarah (Perubatan) UD 48 dan merupakan Inspektorat yang menjalankan kuasa di bawah seksyen 91(1) Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998 (Akta 586) yang telah mengelak premis Plaintif di alamat 10-1, Blok B, Sri Desa Entrepreneur's Park, Jalan 1/116B, Off Jalan Kuchai Lama, 58200 Kuala Lumpur. Sehubungan dengan kedudukan saya tersebut saya adalah layak dan berkuasa penuh untuk mengikrarkan Afidavit Jawapan ini bagi pihak Defendan-defendan.
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> 4. Merujuk kepada keseluruhan Afidavit Plaintif, saya sesungguhnya percaya dan menyatakan bahawa premis yang beralamat di 10-1, Blok B, Sri Desa Entrepreneur's Park, Jalan 1/116B, Off Jalan Kuchai Lama, 58200 Kuala Lumpur telah dilak oleh Defendan Pertama kerana premis tersebut yang beroperasi dengan nama HWC Healthcare Clinic telah didapati melakukan suatu kesalahan di bawah seksyen 4(1) Akta 586 dengan menyediakan kemudahan dan perkhidmatan jagaan kesihatan swasta untuk klinik perubatan swasta untuk mengubati atau mengurangkan apa-apa keadaan luarbiasa tubuh manusia dengan menggunakan apa-apa perkakas, kelengkapan, alat atau peranti atau apa-apa teknologi lain, tanpa pendaftaran dan melanggar ketetapan di bawah seksyen 5(1)(a) Akta 586.
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> 7. Berdasarkan kepada maklumat yang diterima, Unit Kawalan Amalan Perubatan Swasta, Jabatan Kesihatan Wilayah Persekutuan Kuala Lumpur dan Putrajaya, Kementerian Kesihatan Malaysia telah melakukan serbuan dan pemeriksaan ke atas klinik perubatan swasta yang dikenali sebagai HWC Healthcare Clinic yang beralamat di 10-1, Blok B, Sri Desa Entrepreneur's Park, Jalan 1/116B, Off Jalan Kuchai Lama, 58200 Kuala Lumpur.

[22] It is important to note that apart from para. 7, there is no other averment in the affidavit to explain what her belief was or what her reasonable grounds were, for relying on s. 90. Paragraph 7 merely states that the entry and search of the plaintiff's premises was based on information received. No particulars were given of this information. In the absence of this evidence, the defendants' contention that there was a proper exercise of the power under s. 90 is without merit. There is a complete absence of evidence to demonstrate that what they did was done on grounds of urgency. The defendants have failed to show compliance with the terms of s. 90. In the result, I find that the search was unlawful because it was undertaken without any basis in law or fact under s. 90. What was done in this case seems to me to be open to criticism.

[23] There is also nothing in Mimi's affidavit to show that it would have been impracticable for the defendants to apply for a search warrant. Where warrants to search are granted they are specific as to the purpose and limitations of the search. But in this case, as there was no such warrant, no systems were in place to ensure that the items which the officers seized in the course of their search of the premises were confined strictly to those which were relevant to the prosecution of the crime.

[24] In my view, a failure to satisfy the requirement of s. 90 has far reaching consequences. A failure to comply with the requirement of this provision renders the entry/search without a search warrant unlawful in its entirety from the outset, such that all action subsequent to the entry are unlawful.

[25] It follows that I would answer the first issue in the affirmative; that is to say, I would hold that the failure of the defendants to obtain a search warrant rendered the search and seizure unlawful.

[26] In light of my conclusion on the first issue that the entry and search was invalid, the remaining three issues do not arise.

Conclusion

[27] The Act confers extensive powers upon health officers, including a plethora of powers of entry, search and seizure. These powers must be exercised in accordance with the procedure laid down in the Act. The duty of the court is to decide whether, in a given set of circumstances, the officers have taken all reasonable steps to do what the legislature has required them to do. I emphasise that in this application, I am not concerned with the admissibility of the evidence found as a result of the search, but whether the entry and search itself was lawful.

[28] On the facts, it is clear that the entry and search of the plaintiff's premises was unlawful and the defendants are liable in damages. The plaintiff is therefore entitled to the declarations it seeks in this originating summons. The items detained are to be returned to the plaintiff. The defendants shall pay the plaintiff damages to be assessed upon application.